STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. M-15731
	)	
	)	By: Margaret A. Mangan
Rebecca Pelkey	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Chittenden County Sheriff's Department	)	
	)	Opinion No. 24-02WC

Hearing Held in Montpelier on November 26 and November 27, 2001
Record closed on January 11, 2002

APPEARANCES:

William B. Skiff, II. Esq. for the claimant
Frank Talbott, Esq. for the defendant

ISSUES:

1. Has the claimant reached medical end result as to any compensable injury; and if so, when for each compensable injury?

2. Is the medical treatment claimant is receiving reasonable and necessary?

3. Has the claimant returned to pre-injury baseline with respect to injuries that arose out of and in the course of employment?

4. Has the claimant suffered an injury to her cervical spine that arose out of and in the course of her employment?

5. Does the claimant have any permanency relating to a compensable injury; and if so, what is the permanent impairment for each condition?

6. Is the claimant permanently totally disabled as a result of one or more work-related injury?

EXHIBITS:

Joint Exhibit I	Medical Records a and b
Joint Exhibit II:	Employment Records
Joint Exhibit III:	Transcript of deposition of Michael Dee P.T.
Joint Exhibit IV:	Writ Box
Claimant's Exhibit 1:	Social Security decision
Claimant's Exhibit 2:	Residual Functional Capacity Evaluation
Claimant's Exhibit 3:	Fee Agreement
Claimant's Exhibit 4:	Materials from Dr. Mann
Defendant's Exhibit A:	Transcript of deposition of James Mogan, M.D.
Defendant's Exhibit B:	Interrogatories
Defendant's Exhibit C:	List of items in civil box
Defendant's Exhibit D:	Pain Report from SSDI file
Defendant's Exhibit E:	Claims notes
Defendant's Exhibit F:	Letter from Great American to Dr. Saia dated 12/8/99
Defendant's Exhibit G:	Computer notes from Great American

STIPULATED FACTS:

1. The following is the claimant's medical history prior to January 13, 1999:

    a. July 5, 1973: knee operation for chronic subluxing patella
    b. April 19, 1977: L5 excision as a result for insidious onset of back pain for one year. L5 nerve root was enlarged, hyperirritable and pale in color.
    c. April 5, 1984: L5- S1 fusion, partial laminectomy of L4, bilateral foraminotomies at L5-S1.
    d. July 1, 1987: discogram showing lateral protrusions of disc at L3-4 and L4-5.
    e. September 10, 1987: L4-L5 posterior lateral fusion with allograft bone and L4-L5 pedicle screw and spinal fixator.
    f. September 12, 1988: exploration of spinal fixator, debridement of pseudarthrosis; repeat L4-5 bone graft using right iliac crest bone graft.
    g. September 7, 1989: removal of spinal fixator and bony graft inspection.
    h. October 9, 1991: cervical mylelogram; mild diffuse disc bulges at C3-4, C4-5 and C5-6; central and left sided disc herniation at C6-7 affecting left C7 nerve root.
    i. October 22, 1991: C6-C7 discectomy, foraminotomy, and hemilaminectomy.

2. The claimant started working for the Chittenden County Sheriff's Department on October 15, 1990. In approximately 1995-1996 the claimant began doing civil duties at the Sheriff's Department.

3. On January 13, 1999 the claimant was involved in a motor vehicle accident while she was working.

4. The claimant was temporarily disabled from working on account of her motor vehicle accident back injury from January 14, 1999 to September 13, 1999.

5. On September 13, 1999 the claimant returned to work part-time and gradually worked up to a full-time schedule by October 25, 1999. The claimant worked for the Sheriff's Department full time from October 25, 1999 until September 15, 2000.

6. The claimant's average weekly wage for the twelve weeks before January 13, 1999 was $465.15 and her compensation rate was $310.10. She had one dependent.

FACTS:

1. Claimant, born in 1955, is a high school graduate. From 1985 to 1989 she worked at the Marriott as a hostess, and in the payroll and ordering departments. Then, in 1989 she attended the Police Academy where she earned a certificate as a law enforcement officer. She worked at the Franklin County Superior Court and Family Court, then did traffic control.

2. In 1990 she joined the Chittenden County Sheriff's Department. By 1995-96 her job duties involved primarily serving civil process.

3. Claimant's daily routine involved leaving her house in Milton, Vermont at any time between 6:00 a.m. and 10:00 a.m., although she was generally on the road by 8:00 a.m. She arrived at the Sheriff's Department typically between 10:00 and 11:00 a.m. and worked there for a couple of hours doing paper work. She then returned to the road and resumed serving process.

4. Claimant drove in a police cruiser and often made stops to serve papers. Those papers and other necessary materials were kept in a "civil box," a plastic box approximately 12 inches high, 14 inches wide and 11 inches deep with a plastic handle. The civil box served as a portable desk for the claimant. In addition to the papers to be served, the box held telephone books, bottles of water, her lunch and a box of ammunition. Claimant estimated that when full the box weighed about 30 to 40 pounds. The writ box usually lay on the front seat, but claimant had to move it to the back seat when she had a passenger, for example when she drove her son to school.

5. A minor part of her duties involved the occasional transportation of prisoners, serving papers for evictions and replevins. On two occasions in 1994 or earlier, claimant got into scuffles with prisoners she was transporting. Otherwise, claimant's job was not strenuous although it involved a lot of driving—25 to 100 miles per day routinely.

6. On January 4, 1999 claimant saw her primary care doctor, Dr. Saia, at Milton Family Practice. The claimant complained of low back pain, which Dr. Saia diagnosed as musculoligamentous strain. He prescribed Ultram and Diazepam.

7. On January 13, 1999 claimant was traveling in her police cruiser enroute to serve process when she was unable to stop her cruiser and collided with a snowplow. The road was snowy and slippery. She was traveling 10 to 15 miles per hour. Claimant drove her vehicle away from the accident scene, delivered a writ, and then went to the office where she reported the injury.

8. As a result of the motor vehicle accident, claimant experienced low back pain and pain into her left leg. She worked the remainder of the day, leaving the Sheriff's Department at 2:30 p.m. after logging 8 hours of work for the day.

9. Later in the afternoon of the accident, claimant visited Dr. Kimberly Hageman at Milton Family Practice in Milton. Dr. Hageman diagnosed the claimant with acute low back pain with spasms in the lumbosacral area, which the doctor attributed to the motor vehicle accident on top of chronic low back pain. Specifically recorded in the note for that visit is the chronic nature of the claimant's low back pain, with a history of five lumbosacral spine surgeries. The examination revealed no tenderness in the claimant's neck.

10. On her physician's referral, claimant then received physical therapy at Fletcher Allen Health Care (FAHC) until February 5, 1999.

11. By January 28, 1999 Dr. Saia noted improvement in the claimant's low back pain to the point where she no longer needed Percocet, and although she still had some pain, she was walking and driving.

12. In February 1999 Dr. Saia referred claimant to the Pain Clinic at FAHC. Epidural steroid injections did not help; in fact they made the pain worse. Therefore, she was referred to the Neurosurgery Clinic where she saw Dr. Bednar who was unable to find a focal problem to explain her pain. To rule out a compressive lesion, he ordered a myelogram, which revealed no disc herniations, no spinal stenosis and no lesions causing neurological impingement. With surgery ruled out as an option, the physicians recommended more physical therapy.

13. In March 1999 claimant began Physical Therapy at Excel PT.

14. On May 3, 1999 Dr. John Peterson saw the claimant for an independent medical examination related to the January motor vehicle accident. He diagnosed low back pain as a result of the motor vehicle accident, predicted that her recovery could be prolonged because of her medical history and found no signs of magnification or inappropriate illness behavior. Dr. Peterson recommended continued physical therapy for four to eight weeks, continued tapering of medication, and progression to an independent exercise program.

15. By June 8, 1999 Dr. Saia noted that the claimant was walking more actively and with much less pain. She had been gardening; her gait had returned almost to normal. And her range of motion, although still limited, was approaching normal. In a physical therapy record for that same day, her progress was noted in these terms: "functional activity level has increased as she is now gardening, working, walking at home and able to tolerate a full hour gym routine." It was also noted that claimant continued to have pain that she was managing with medication. The therapist determined that claimant was ready for a Functional Capacity Evaluation (FCE) which Dr. Saia then ordered.

16. That Functional Capacity Evaluation was performed in July 1999. The results were the recommendations for a light work capacity and gradual return to work. It was determined that the claimant met the physical demands of her job.

17. Dr. Saia recommended a 4-week work hardening program and referred her to Dr. Gryzb at the Spine Institute for that purpose.

18. In mid-September 1999 Dr. Saia released the claimant to work on a gradual basis, consisting of 2 hours per day for two weeks, then 4 hours per day for two weeks, then 6 hours per day for 2 weeks, and if able, resuming full time work beginning October 25, 1999.

19. On September 13, 1999 the claimant returned to work at the Sheriff's Department and by October 25, 1999 was working at least 8 hours per day, with as many as 12 hour on some days.

20. In early October of 1999 the claimant saw Dr. Saia for a complaint of neck pain, which she first noticed while combing her hair one morning. The doctor increased the dosages of Roxicet and Diazepam because of the neck pain.

21. The physical therapist noted on October 4, 1999 that the claimant had "no complaints," although the claimant maintains that she injured her neck moving her writ box from the back seat to the front seat (or vice versa) of the cruiser that day. The claimant made no report of injury to her supervisor about the alleged writ box incident although she spent several hours at the office with him each day.

22. The claimant's concern that she may have herniated a disc in her neck is clearly documented in an October 7, 1999 physical therapy note. In addition, Dr. Saia's office records document the claimant's suspicion that she ruptured a disc in her neck at physical therapy.

23. However, in his October 7, 1999 note Dr. Saia attributed the claimant's complaints to "driving in a police cruiser which constantly pulls to the left requiring that she hold the steering wheel constantly with her right hand in order to control the car." Not until December 29, 2000 is there any reference to a writ box in any of Dr. Saia's notes.

24. On her own, the claimant suspended her physical therapy on October 8, 1999 until she had an MRI of her neck.

25. When she returned to physical therapy on December 6, 1999 claimant reported hurting her neck while lifting a box at work. Specifically she reported, "lifting a 20 pound box into back seat of car-within following week-pain in neck intensified."

26. In January 2000 the claimant underwent EMG studies based on her history of cervical pain with radiation to both arms. Dr. Fries interpreted the EMG as showing "reinnervation" of a mild degree in the cervical area of her spine, related to "old or chronic indolent C7 radiculopathies on both sides." Then in April of that year, she underwent further EMG studies that showed ulnar neuropathy at the left elbow and a suggestion of ulnar neuropathy at the right elbow.

27. To Dr. Peterson at a second IME in February 2000 the claimant reported that her neck symptoms might have started when she was doing free weights at a gym as part of therapy the previous August. She also reported to Dr. Peterson that she felt some discomfort when she lifted her 20 pound writ box from the front to back seat with poor body mechanics. The doctor noted that she had lost 16 pounds since he had seen her a year earlier, that her gait was normal, that she had limits in cervical and lumbar range of motion and that motor testing in the lower extremities was intact and symmetrical. He noted that the medical records did not fully corroborate her history. Dr. Peterson noted that the claimant's medication use had escalated dramatically.

28. Dr. Peterson was not able to say that claimant had yet reached medical end result for her low back. From his review of the records, a previous examination and her own report, Dr. Peterson concluded that her neck complaints were responsible to a degree for her increased narcotic usage and that those neck complaints were not related to her motor vehicle accident or her return to work.

29. On a referral from Dr. Saia, claimant saw a psychologist, Steven P. Mann, Ph.D., in April 2000.

30. Despite her complaints of neck pain, the claimant continued to work full time for the Sheriff's Department from October 25, 1999 until September 15, 2000, when Dr. Saia took her out or work. At that time, she was working 8 to 9 hour days and was still taking pain medication for back pain, including OxyContin. Dr. Saia opined that the claimant is addicted to pain medication but has not escalated its use.

31. John J. Saia, M.D. is a board certified family physician and the claimant's primary care provider. Since 1980 he has taught Family Practice Medicine at the UVM School of Medicine.

32. On September 25, 2000 Dr. Saia determined that the claimant was unable to work due to her pain and had been unable to work two days the previous week. On his orders, claimant has remained out of work since that time. In Dr. Saia's opinion, the claimant's condition was aggravated by her work, specifically driving the police cruiser and lifting things in the cruiser.

33. In October 2000 the claimant consulted with Dr. Angier who diagnosed a failed back syndrome "with magnification of symptoms." On physical examination, the doctor was able to elicit marked tenderness even with light touch, a reaction that was not produced when the claimant was distracted.

34. On November 9, 2000 Dr. Johansson found that the claimant had significant pain reactivity although he did not classify it as symptom magnification. He placed her at medical end result for her low back. He reiterated that opinion in 2001 when he explained that her low back condition had stabilized by November of 2000 and had not changed substantially. With respect to the lower back, claimant has had no herniated disc, no spinal stenosis, no radiculopathy, no fractures and no foraminal narrowing since the surgeries she had before the work-related motor vehicle accident in 1999.

35. Also, since November 9, 2000 the claimant has had no treatment other than palliative care for her back.

36. When Dr. Mogan saw the claimant on November 13, 2000 for ulnar nerve neuritis, he characterized her problem as difficult "in that she does have a chronic pain syndrome."

37. On December 5, 2000 Dr. Mogan, a hand specialist, performed a left ulnar nerve transposition, which claimant asserts was caused at work by her resting her left arm on the window of the cruiser. However, Dr. Mogan was unable to say that work was the probable cause. The observations he made during surgery were suggestive of a chronic injury.

38. It was not until December of 2000 that Dr. Saia learned anything about claimant lifting boxes into a police cruiser.

39. On January 5, 2001 Dr. Mann expressed the opinion that claimant was compliant with prescribed pain medications, was not using the medications for feelings of euphoria and was not at risk for drug abuse. Specifically, he stated, "she takes just enough narcotic pain medications to allow a decrease in pain and an increase in mobility."

40. On February 12, 2001 the claimant underwent a Functional Capacity evaluation at HealthSouth in South Burlington. During that evaluation claimant demonstrated the ability to work at a sedentary job for an eight-hour shift that allowed for frequent changes in position. By "sedentary" is meant an ability to lift up to 10 pounds occasionally, not that one would need to sit all day.

41. Michael Dee, P.T., who performed the FCE, noted that claimant had some inconsistency in her physical movements, specifically a cogwheel type resistance with manual testing that is typical of Parkinson's disease and not likely in one with muscle weakness; the favoring of her right, non affected, leg during a distracted conversation with a shift back to her left when she was reminded of the discrepancy; and the inconsistency between heart rate changes and her reports of pain. When an activity provokes significant pain, which claimant claimed during the FCE, a concomitant significant increase in heart rate can be expected, which did not happened with this claimant. That inconsistency cannot be explained by the medications she was taking.

42. In March 2001 the claimant was hospitalized for ten days for "intractable neck pain," which an EMG confirmed was due to "acute right C6 radiculopathy." Because the radiculopathy was not evident on the two EMGs performed in 2000, and because of its acute nature, the radiculopathy clearly occurred after the claimant left her job at the Sheriff's Department. Dr. Saia attributed the problem to forceful vomiting claimant endured during an acute illness in March 2001.

Diagnosis, Psychological Impairment and Treatment

43. In Dr. Saia's opinion, claimant has depression due to her unremitting back pain secondary to the January 13, 1999 accident. Dr. Mann diagnosed the claimant with a major depressive disorder secondary to her loss of function and pain related to the accident of January 13, 1999.

44. Dr. Saia referred the claimant to Steven Mann, Ph.D. for assistance with her pain control. Dr. Mann is a psychologist, board certified in pain management and rehabilitation psychology.

45. His goals for this claimant are to decrease pain intensity, increase activities of daily living, decrease fatigue and decrease narcotic dependence. Proposed treatment for pain reactivity includes relaxation and guided imagery. Behavioral techniques are postural awareness, pacing, timing and rhythm. Dr. Mann treated the claimant with transcranial microcurrent stimulation (Alpha Stim), combined with cognitive behavioral techniques to reduce her global pain reactivity. Initially, the purpose was to help the claimant reduce her use of narcotics, a goal not realized.

46. Dr. Mann treated the claimant with the Alpha-Stim treatment from April 6, 2000 until August 15, 2000, then from December 2000 until August 2001. Relief from the treatments was transitory and short-lived. His notes are replete with the opinion that claimant's lack of progress is due to the carrier's failure to cover the cost of the multidisciplinary program he recommended. Nevertheless, he treated her with the Alpha Stim, biofeedback and progressive relaxation techniques. By July 5, 2001 he expressed concern about "escalating narcotic dose scenario, as Ms. Pelkey's pain increases and she becomes less responsive to narcotic pain relief [which] is the primary reason that I support an integrated pain management and rehabilitation program."

47. Dr. Mann believes that the claimant's lack of functional gains is due to the stopgap nature of the care she has received. He proposes that the claimant obtain an Alpha-Stim device and enroll in a multidisciplinary program.

48. Dr. Mann determined that the claimant has: depression with "disturbingly high levels of depressive symptomatology" on the Pain Patient Profile; anxiety with a very elevated anxiety score on the Pain Patient Profile; and somatization with a high score in this area on the Pain Patient Profile. She has a severe, chronic pain syndrome. He noted that she has a difficult time with self-care as demonstrated by difficulty dressing, bathing, and cooking for herself because of her depression. Because the insurance carrier refused to approve payment for a multidisciplinary program, Dr. Mann believes she "has slipped further into a severe chronic pain syndrome and now depends on heavy doses of pain medications to remain basically functioning."

49. Dr. Mann determined that the claimant has a mental/behavioral impairment and that she is at medical end result "[g]iven the fact that additional treatment is not forthcoming and is not authorized." He assessed a 30% rating. To understand that rating, it is first important to note how impairment ratings for physical injuries are determined.

50. In the 5th edition of the *AMA Guides to Permanent Impairment* physical impairments are defined by a numerical value stated as a percentage of whole body impairment. For example, Ratings for Permanent Impairment Due to Anemia can be found in Table 9-2 with a Class 1 having a 0% to 10% impairment of the whole person; Class 2 with an 11% to 30% impairment, Class 3 with 31-70% impairment and Class 4 with 71-100%.

51. In the chapter on the Central and Peripheral Nervous System, ratings are given in Table 13-8 for emotional or behavioral disorders. A Class 1, with 0% to 14% whole person impairment involves mild limitation of activities of daily living and daily social and interpersonal functioning. Class 2 with 15% to 29% impairment involves moderate limitation of some activities of daily living. Class 3 with 30% to 69% impairment involves "severe limitation in performing most activities of daily living, impeding useful action in most daily social and interpersonal functioning." And Class 4 with a 70% to 90% impairment involves a severe limitation requiring total dependence on another person.

52. Chapter 14, the chapter on Mental and Behavioral Disorders, directs that specific areas of function be evaluated, including activities of daily living, social function, concentration and adaptation to stress. Table 14-1, like the other chapters in the *Guides*, delineates several classes, in this case Class 1 through Class 5. However, this chapter differs from all the others in one crucial respect: no percentages are identified. Class 1 is simply defined as "no" impairment; Class 2 as "mild" impairment; Class 4 as "marked" impairment; and class 5 as "extreme" impairment.

53. When asked to explain how he determined that claimant has a 30% impairment, Dr. Mann explained that claimant's impairment, based on testing and his evaluation, falls into Class 4 because it is marked. He then compared that determination to categories established by the Colorado Division of Workers' Compensation Psychiatric Task Force, which assigns a 30% rating to those with this claimant's degree of impairment. Finally, he noted that 30% would be the rating were the claimant's impairment the result of a nervous system disorder because it severely limits her activities of daily living. See, Table 13-8.

54. Psychological testing shows that the claimant has the ability to get along with others without behavioral extremes; the ability to comprehend and follow simple commands, the ability to apply common sense to carry out a task; the ability to ask simple questions and request assistance when needed. She has no impairment with judgment or with the ability to perform activities on schedule and to be punctual.

55. However, the claimant has mild impairment in these areas: self care and hygiene, normal living postures and ambulation, travel (driving, riding and flying), ability to initiate contacts, negotiate and compromise, that ability to communicate clearly and effectively with others; the ability to abstract or understand concepts; immediate and remote memory, the ability to manage conflicts with others, the ability to set realistic goals and have good autonomous judgment.

Permanent Total Disability

56. In Dr. Saia's opinion, the claimant cannot return to any type of work. That conclusion is based on the claimant's reports of pain and his understanding that a sedentary job is one where the claimant must sit for eight hours a day. Dr. Saia does not know the extent of the claimant's transferable skills.

Medical End Result

57. Dr. Saia opined that the claimant reached medical end result sometime in the late Summer or Fall of 2001. He believes that she has not returned to the level she was at prior to the March 2001 hospitalization.

58. According to Dr. Johansson, claimant had reached medical end result by November 9, 2000 when there was no further required or medically necessary treatment to offer her.

Proposed Multidisciplinary Program including Alpha-Stim Treatment

59. Dr. Mann has proposed a multidisciplinary program involving Alpha-Stim, pool therapy, massage therapy and physical therapy.

60. An Alpha-Stim is a unit designed to pain control. In Dr. Mann's opinion, if the claimant were to have a unit in her home, she would be able to control her pain and reduce her depression and sleeplessness, which in turn should lead to reduction in pain medication she is now taking. The home unit costs $350.00.

61. Dr. Johansson opined that the proposed treatments are not likely to change the claimant's chronic pain syndrome. This opinion is based on the transient and short-lived pain relief claimant received from the Alpha-Stim treatments she has already had and her failure to decrease narcotic pain medication at all, even with a few hours of pain relief.

62. The claimant has undergone extensive evaluation at the New England Spine Institute including multidisciplinary rehabilitation with psychology and physical therapy. In addition, she had one month of physical therapy at FAHC, sixteen months of physical therapy at Excel P.T. and various periods of aquatic therapy.

Claimant's Medications

63. Claimant is taking: Oxycontin, Roxicet, Diazepam, Baclofen, Wellbutrin, Zoloft, Celebrex, Neurontin and Meclizine.

64. After the motor vehicle accident, Dr. Saia prescribed Roxicet and Diazepam, with a period of OxyContin, for her pain. Wellbutrin is an antidepressant Dr. Saia prescribed to help the claimant quit smoking. Dr. Scott prescribed the Baclofen and Flexoril for bilateral arm numbness and, later, Celebrex.

65. The record is not clear when and for what reasons Zoloft and Neurontin were prescribed.

66. Claimant has submitted a claim and supporting documentation for a contingency attorney fee award and costs totaling $6,338.46.

DISCUSSION:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press,* 144 Vt. 367 (1984).

2. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

Permanent Total Disability

3. Prior to July of 1999 a claimant was entitled to permanent total disability if her injury was within the list enumerated in 21 V.S.A. § 644, or if, without considering individual employability factors such as and experience, the medical evidence indicates that she is totally disabled from gainful employment. *Fleury v. Kessel/Duff Constr*. Co., 148 Vt. 415 (1987). Under the non-exclusive list of injuries in § 644 the following were deemed total and permanent: 1) the total and permanent loss of sight in both eyes; 2) the loss of both feet at or above the ankle; 3) the loss of both hands at or above the wrists; 4) the loss of one hand and one foot; 5) an injury to the spine resulting in permanent and complete paralysis of both legs or both arms or of one leg and of one arm; and 6) an injury to the skull resulting in incurable imbecility or insanity.

4. Since July of 1999, a claimant is entitled to permanent total disability if her injury is within the enumerated list articulated in 21 V.S.A. § 644 (a) or is equivalent to that list since it is not exclusive. To determine disability, the commissioner "shall consider other specific characteristic of the claimant including the claimant's age, experience, training, education and mental capacity." § 644 (b). The standard is further articulated in § 645(a), which specifies that one must have "no reasonable prospect of finding regular employment."

5. Dr. Saia supports the claimant's claim for permanent total disability with the opinion that the claimant's unrelenting pain prevents her from having even a sedentary work capacity and her use of narcotic medications additionally impacts her ability to work. Dr. Mann opined that the areas of function involving thinking, concentration, persistence and pace have been severely affected by the claimant's disturbed emotional functioning.

6. Yet, evidence as a whole fails to support a claim under either the pre or post 1999 definitions of permanent total disability. The claimant's pain condition does not fall within the list enumerated in § 644,nor is it functionally equivalent to any of the disorders listed. Claimant's young age, her work experience, training and mental capacity all militate against a finding of permanent total disability. The FCE clearly establishes that the claimant has a sedentary work capacity, meaning that gainful employment is possible for her. Therefore, she has not sustained her burden of proving permanent total disability.

Cervical Spine Injury

7. The record of a cervical spine injury contemporaneous with the claimant's initial neck complaints in October of 1999 has to do with her combing her hair at home, not with any work-related incident. Yet, at that time she was driving a police cruiser that pulled to one side, was undergoing physical therapy and was moving her civil box around in her car. Consistency and precision in reporting facts are somewhat lacking in this case. Nevertheless, it is more likely that activities involved in her work than with brushing her hair precipitated the neck pain, although she may not have been acutely aware of it until she raised her arm to brush her hair. But a finding of work-related neck pain in the fall of 1999 is not acceptance of her claim for permanent impairment to her neck. In fact, her working for almost a year after the onset of neck pain suggests that the October 1999 work-related incidents are not related to her current neck complaints.

8. Further attenuating any causal link is the March 2001 hospitalization for intractable neck pain, six months after she left the Sheriff's Department. The permanent impairment the claimant now has in her neck, therefore, is not a result of a work-related injury, and is therefore, not compensable.

Claim for TTD since November 9, 2000 and Medical End Result

9. Under the workers' compensation law, a claimant is entitled to temporary disability compensation until reaching medical end result or successfully returning to work. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996). Medical end result is the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected regardless of treatment. WC Rule 2. The fact that some treatment such as drug or physical therapy continues to be necessary does not preclude a finding of medical end result if the underlying condition causing the disability has become stable and if further treatment will not improve that condition. *Coburn* 165 Vt. 529.

10. "[A] claimant may reach medical end result, relieving the employer of temporary disability benefits, but still require medical care associated with the injury for which the employer retains responsibility. *Pacher v. Fairdale Farms* 166 Vt. 626, 629 (1997); *Coburn,* 165 Vt. at 532. The necessity of treatment such as physical therapy or medications is not inconsistent with fining medical end result. *Pacher,* 166 Vt. 626.

11. Palliative care means medical services rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition. Id.

12. According to Dr. Johansson, claimant had reached medical end result by November 9, 2000 when there was no further required or medically necessary treatment to offer her. However, he agreed to her participation in a three-month aquatic rehabilitation membership. In Saia's opinion, claimant had not reached medical end result until late summer of 2001, a point at which he said that she had reached a plateau in her recovery process. That conclusion is based on the claimant's slow recovery and need to give her time before deciding that further improvement unlikely. The record at and after November 2000 fails to support Dr. Saia's opinion that significant improvement in the claimant's low back condition was expected. Therefore, claimant had reached medical end result by November of 2000 and is not entitled to temporary total disability benefits since that time.

Impairment Rating on Low Back Injury

13. Dr. Johansson used the 4th edition of the *AMA Guides to the Evaluation of Permanent Impairment* when he determined that claimant had reached a medical end result by November 11, 2000 and assigned a 5% whole person impairment rating. He used the edition in effect at the time of his rating. The 5th Edition of the *Guides* was published a few months later, in January 2001. When Dr. White assessed an 8% rating on August 31, 2001 he did so based on the 5th edition of the *Guides*, a rating with which Dr. Johansson agrees if the 5th edition is applicable here because the 5th edition provides for an increase for pain.

14. Because in its brief the defense has essentially conceded to Dr. White's rating, the Department will award the claimant permanency benefits based on 8% whole person.

Psychological Condition

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. More specifically, the progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause.

Larson and L.K. Larson, *Larson's Workers' Compensation Law*, ch. 10. at 10-1.

15. Underlying the multiple issues in this case is this central issue of causation, that is whether the claimant's current condition is a natural consequence of a work-related injury. From all accounts, claimant suffers from a chronic pain syndrome, which Dr. Mogan identified as a problem in November of 2000 when he saw her for ulnar neuritis, a problem that was not work related. In fact, at the time of her visit to Dr. Mogan claimant was no longer working for the Sheriff's Department. The chronic nature of her pain is well documented in the records of Dr. Saia, Dr. Mann and all other clinicians who have examined the claimant. As a result she is depressed and anxious.

16. The defense challenges Dr. Mann's use of the Mental and Behavioral Disorders Chapter in the *Guides* as inappropriate for a claimant with a pain condition because chapter 18 specifically addresses the subject of Pain. However, given the ultimate disposition of this case, that argument need not be addressed here.

17. Although claimant suffered a work related low back injury in January of 1999, the record does not support claimant's contention that her current pain condition is a natural result of that accident. After months of temporary total disability benefits and physical therapy, claimant returned to work full-time, albeit on pain medication. Dr. Saia took her out of work in September of 2000 because of reported pain, but no specific incident occurred at that time. Her primary care physician concedes that an illness in March of 2001 injured her neck and precipitated the need for urgent hospitalization and treatment. What has since been diagnosed as C6 radiculopathy is not work related, although it is a source of pain.

18. Events since the 1999 motor vehicle accident have intervened to sever the causal connection between the claimant's work-related injury and her current pain condition. The treatment program proposed by Dr. Mann, even if reasonable for the claimant's overall pain condition, is not reasonable for the only compensable aspect of this claim – the lower back. However, the carrier shall continue to cover prescriptions for OxyContin, Roxicet and Diazepam, as it has agreed.

CONCLUSION:

The claimant's compensable injury is the injury to her lower back for which she is entitled to permanency benefits based on an 8% whole person rating. Her cervical spine injury and pain condition did not arise out of and in the course of employment. As such, she is not entitled to benefits associated with those conditions. Finally, her claim for permanent total disability is denied.

ORDER:

THEREFORE, Based on the Foregoing Findings of Fact and Conclusions of Law,

The claimant is awarded permanency based on an 8% whole person rating.

All other claims are DENIED.

Dated at Montpelier, Vermont this 29th day of May 2002.

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R. Tasha Wallis
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.